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SERVICE DATE - LATE RELEASE DECEMBER 17, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 32306

WERTHEIM SCHRODER & CO., INCORPORATED AND GATEWAY
WESTERN RAILWAY COMPANY—CONTINUANCE IN CONTROL
EXEMPTION—GATEWAY EASTERN RAILWAY COMPANY

Decided: December 11, 1997

Gateway Western Railway Corporation (Gateway Western), Gateway Management Partners, L.P. (Partners), McCarren Corporation (Corporation), and Mr. J. Reilly McCarren (McCarren) (jointly referred to as petitioners) on June 3, 1993, filed a petition for exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 11343-45 to permit them to continue in control of Gateway Eastern Railway Corporation (Gateway Eastern) upon its becoming a rail carrier.² The control petition was related to notices of exemption that were filed about the

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² Originally, the petition for exemption was filed jointly by Gateway Western and Wertheim Schroder & Co., Incorporated (WSI), an investment company and the noncarrier parent of both Gateway Western and Gateway Eastern. The petition stated that WSI and an affiliate owned 100% of Gateway Western's preferred stock and 85% of its outstanding common stock. In 1994, Gateway Western was acquired by Partners, and a joint petition for leave to substitute as parties for WSI was filed subsequently by petitioners. The petition for leave to substitute stated that Partners owns 99.9% of Gateway Western's stock; Corporation manages and operates Partners as the sole general partner; and McCarren is the sole shareholder of Corporation and president as well as a director of Gateway Western. Additionally, it stated that WSI; McCarren; Thomas King, Gateway Western's vice president and chief financial officer; Paul Fetterman, Gateway Western's vice president and

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same time in three other proceedings, Finance Docket Nos. 32304, 32307, and 32454.³ Patrick W. Simmons, Illinois Legislative Director for United Transportation Union (IL-UTU), filed a timely protest to the control petition. IL-UTU contended that WSI personnel also serve as officers and directors of other carriers and requested that the application of 49 CFR 1185.1, the class exemption from the prior approval requirements of 49 U.S.C. 11322(a) for interlocking directorates, Exemption—Certain Interlocking Directorates, 5 I.C.C.2d 7 (1988) (Interlocking Directorates), aff'd sub nom. United Transp. Union v. ICC, 891 F.2d 908 (D.C. Cir. 1989), cert. denied, 497 U.S. 1024 (1990),⁴ be revoked in connection with the control petition unless WSI voluntarily revealed which of its personnel are officers and directors of other transportation companies.

In a decision served July 6, 1995, the ICC determined that IL-UTU was objecting only to a failure to disclose that certain persons affiliated with WSI also served as officers and directors of

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chief engineer; and GWRR Acquisition Company, L.P. (Acquisition) are non-voting, limited partners in Partners, and that Partners, Corporation, and McCarren control no other carriers.

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IL-UTU has filed a petition to reopen the July 6 decision to the extent it granted the control exemption. IL-UTU contends that the ICC mischaracterized its protest and committed material error; it requests that the application of the interlocking directorates exemption be revoked and the record be reopened to require WSI to disclose all the relationships its officers and directors have with other transportation companies. Essentially, IL-UTU asserts that McCarren purchased Gateway Western and questions whether this was possible without obligations to others. Thus, it argues that WSI's restructured interest in Gateway Western, as a nonvoting, limited partner, is not dispositive of control. IL-UTU also questions the omission of any reference in the substitution petition to Gateway Western's preferred stock. As an alternative basis for reopening, IL-UTU contends that additional financial information is needed in view of rail labor's challenges to the control of Gateway Western in other proceedings. Specifically, IL-UTU seeks information concerning the common and preferred stock interests, debt arrangements, and partnership agreements pertinent to the related financial arrangements of Partners, Corporation, McCarren, Gateway Western, WSI, and Acquisition, and it requests that our Office of Compliance and Enforcement be directed to participate in developing the record.

DISCUSSION AND CONCLUSIONS

We will deny IL-UTU's petition to reopen and revoke. Under 49 CFR 1115.3, a discretionary appeal will be granted only upon a showing that the prior action will be materially affected because of new evidence or changed circumstances or that the prior action involves material error. IL-UTU has not shown that reopening and revocation of the ICC's July 6 decision is warranted under these standards.

In Interlocking Directorates, the ICC concluded that there was no longer a valid basis for requiring the prior approval of interlocking directorates that did not involve Class I railroads. Generally, it found that existing relationships between carriers are not affected by interlocking directorates; that there is no reason to believe that any public or private interests would be harmed where carriers themselves desire a specific individual's service as an officer or director; that interlocking directors or officers who failed to act in the best interest of the railroad being served, in violation of their fiduciary duties, would be personally liable to the company and its shareholders for their conduct; and that, in view of the relatively small size of Class II and III railroads and the overall competition in transportation industry, the impact of such linkages would be insubstantial and unlikely to result in the domination of a carrier contrary to its own or a shipper's best interest. The ICC stated that other statutory restraints as well as its own revocation power were adequate to deal with unusual transactions involving an interlocking directorate that is anticompetitive or

otherwise adversely affects the national transportation policy of 49 U.S.C. 10101a. Interlocking Directorates, 5 I.C.C.2d at 12-13.

IL-UTU has failed to establish material error in, much less any likelihood of injury growing out of, the control exemption granted in the ICC's July 6 decision. Essentially, it observes that WSI officers and directors also serve as officers and directors of other railroads and suggests that WSI may be in some position of control with Gateway Western. IL-UTU offers no credible support for its skepticism that McCarren could have purchased Gateway Western without being obligated to others. Petitioners, on the other hand, do not deny that McCarren purchased Gateway Western but categorically deny that WSI controls Gateway Western or Gateway Eastern. They maintain that control of Gateway Western passed from WSI to several other entities ultimately controlled by McCarren, that individuals associated with WSI no longer sit on Gateway Western's board of directors, and that WSI has no voting power with respect to the selection of board members or any other aspect of Gateway Western's affairs. In view of petitioners' denial and the lack of any credible evidence to the contrary, we can find no basis to the claim of material error in the ICC's July 6 decision or justification to permit IL-UTU to obtain the information it seeks.

Moreover, even if IL-UTU had presented credible evidence to suggest that WSI was in a position of control with respect to Gateway Western, this would not, in and of itself, establish a basis for revocation or for reopening the record. Indeed, there is nothing here that suggests, nor has IL-UTU even argued, that the control exemption was unusual so as to involve an interlocking directorate that was anticompetitive or that would adversely affect the national transportation policy of 49 U.S.C. 10101a.

Finally, in terms of injury, IL-UTU has not alleged, and in view of the ICC's imposition of the New York Dock conditions, it is not apparent how there could be, a likelihood of injury to rail employees as a result of the grant of the control exemption.⁵ Moreover, we find it unlikely that rail employees will be adversely affected in the future in view of the acquisition of Gateway Western and Gateway Eastern that was authorized by the Board in Kansas City Southern Industries, Inc., KCS Transportation Company, and the Kansas City Southern Railway Company—Control—Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311 (STB served May 1, 1997).

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

⁵ We note that the D.C. Circuit, in United Transp. Union v. I.C.C., 891 F.2d 908, 913 (D.C. Cir. 1989), has already found the prospect that a rail union would be harmed by anticompetitive impacts of interlocking directorates involving Class II and III rail carriers too speculative to confer judicial standing.

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It is ordered:

1. The petition to reopen and revoke is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

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otherwise adversely affects the national transportation policy of 49 U.S.C. 10101a. Interlocking Directorates, 5 I.C.C.2d at 12-13.

IL-UTU has failed to establish material error in, much less any likelihood of injury growing out of, the control exemption granted in the ICC's July 6 decision. Essentially, it observes that WSI officers and directors also serve as officers and directors of other railroads and suggests that WSI may be in some position of control with Gateway Western. IL-UTU offers no credible support for its skepticism that McCarren could have purchased Gateway Western without being obligated to others. Petitioners, on the other hand, do not deny that McCarren purchased Gateway Western but categorically deny that WSI controls Gateway Western or Gateway Eastern. They maintain that control of Gateway Western passed from WSI to several other entities ultimately controlled by McCarren, that individuals associated with WSI no longer sit on Gateway Western's board of directors, and that WSI has no voting power with respect to the selection of board members or any other aspect of Gateway Western's affairs. In view of petitioners' denial and the lack of any credible evidence to the contrary, we can find no basis to the claim of material error in the ICC's July 6 decision or justification to permit IL-UTU to obtain the information it seeks.

Moreover, even if IL-UTU had presented credible evidence to suggest that WSI was in a position of control with respect to Gateway Western, this would not, in and of itself, establish a basis for revocation or for reopening the record. Indeed, there is nothing here that suggests, nor has IL-UTU even argued, that the control exemption was unusual so as to involve an interlocking directorate that was anticompetitive or that would adversely affect the national transportation policy of 49 U.S.C. 10101a.

Finally, in terms of injury, IL-UTU has not alleged, and in view of the ICC's imposition of the New York Dock conditions, it is not apparent how there could be, a likelihood of injury to rail employees as a result of the grant of the control exemption.⁵ Moreover, we find it unlikely that rail employees will be adversely affected in the future in view of the acquisition of Gateway Western and Gateway Eastern that was authorized by the Board in Kansas City Southern Industries, Inc., KCS Transportation Company, and the Kansas City Southern Railway Company—Control—Gateway Western Railway Company and Gateway Eastern Railway Company, STB Finance Docket No. 33311 (STB served May 1, 1997).

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

⁵ We note that the D.C. Circuit, in United Transp. Union v. I.C.C., 891 F.2d 908, 913 (D.C. Cir. 1989), has already found the prospect that a rail union would be harmed by anticompetitive impacts of interlocking directorates involving Class II and III rail carriers too speculative to confer judicial standing.

Finance Docket No. 32306

It is ordered:

1. The petition to reopen and revoke is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary